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No. 96-8986

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Question Presented

Whether this Court has jurisdiction to grant certiorari, vacate and remand this case, per suggestion of Acting Solicitor General, where the Court of Appeals denied petitioner a Certificate of Appealability (28 U.S.C. §2253).

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and [p]romote the proper and fair administration of justice". NACDL has more than 9,000 members nationwide -- along with 78 state and local affiliate organizations numbering 25,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court on many occasions as amicus curiae. See, e.g., Trest v. Cain, 66 U.S.L.W. 4023 (1997).[1]

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1 Both parties have consented to NACDL's appearance in this matter as amicus curiae. No counsel for any party has authored this brief in whole of in part and no person or entity, other than amicus curiae, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

Statement of the Case

This case raises important questions relating to the power of this Court to entertain petitions for certiorari from state and federal prisoners who have been denied Certificates of Appealability from federal courts of appeals in seeking review of the denial of habeas corpus relief by the district courts. Historically, it had been only state prisoners seeking to appeal who were required to obtain certificates of probable cause to bring their cases before federal courts of appeals. See Ira P. Robbins, The Habeas Corpus Certificate of Probable Cause, 44 Ohio St. L.J. 307, 313-15 (1983).

However, the passage of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, effective April 24, 1996, newly codified at 28 U.S.C. §2253, now requires federal prisoners to obtain Certificates of Appealability in order to receive plenary appellate review of their §2255 motions. Under AEDPA, these certificates may be issued only where the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

The significance of the denial of this certificate is that courts of appeals summarily dismiss habeas appeals with the consequence that the litigant's case is not deemed to have properly been "in" the court of appeals for certiorari purposes under this Court's relevant jurisdictional statute. 28 U.S.C. §1254(1). See, e.g., Davis v. Jacobs, 454 U.S. 911, 912-19 (1981)(Stevens, J., opinion respecting denial of certiorari); id. at 920-22 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari); Jeffries v. Barksdale, 453 U.S. 914, 915-16 (1981)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari). See especially, Robbins, 44 Ohio St. L.J. at 308-12 & n.27

(discussing Davis and Jeffries).[2]

In the instant case, Arnold F. Hohn was convicted in the federal district of Nebraska in 1992 of the crime of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of drugs with intent to distribute them (18 U.S.C. §924(c)). Three years later, this Court decided Bailey v. United States, 116 S.Ct. 501 (1995), substantially narrowing the range of conduct deemed criminal under Section 924(c)'s "use" prong. Id. at 508-09. In so ruling, the Court overturned those courts of appeals, among them the Eighth Circuit, which had held that the only nexus required between a firearm and drugs was "availability", "accessibility", or "proximity" of the firearm to the defendant. Id. at 506, 508.

Because there was no evidence whatever that Hohn had in any respect "used" or "carried" a firearm as interpreted in Bailey, he filed a motion under 28 U.S.C. §2255 challenging his conviction under Section 924(c)(1). The district court

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2 Parenthetically, it should be noted that this Court has nevertheless regularly entertained certiorari petitions and granted plenary merits review in cases in which courts of appeals have denied certificates of probable cause. See, e.g., Lozada v. Deeds, 498 U.S. 430, 431-32 (1991); Allen v. Hardy, 478 U.S. 255, 257-58 (1986); Smith v. Digmon, 434 U.S. 332 (1978); Humphrey v. Cady, 405 U.S. 504, 506 (1972); Burwell v. Teets, 350 U.S. 808 (1955); Rogers v. Teets, 350 U.S. 809 (1955); In re Burwell, 350 U.S. 521, 522 (1955).

As Justice Stevens noted in Davis, 454 U.S. at 912-13, this Court squarely held in the procedurally identical case of House v. Mayo, 324 U.S. 42, 44-45 (1945), that even where the Court lacked statutory certiorari jurisdiction under the predecessor statute to §1254, it nonetheless retained common law certiorari power under the All Writs Act (28 U.S.C. §1651) to entertain the writ and grant plenary merits review. See also Dallin H. Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153, 182-88 (discussing history of common law certiorari).

dismissed the motion on July 18, 1996 (Pet. App. 8a-9a) and a divided panel of the court of appeals (Magill & M.S. Arnold, JJ.)(McMillian, J., dissenting) denied him a certificate of appealability (99 F.3d 892)(Pet. App. 1a-7a). Rehearing and en banc review were denied on February 10, 1997 (Pet. App. 21a)(McMillian, Beam, Loken & Hansen, JJ., dissenting).

This Court has already granted certiorari in another case from the Eighth Circuit to consider the retroactive application of Bailey -- Bousley v. Brooks, No. 96-8516 (U.S. cert. granted September 29, 1997). In response to Hohn's certiorari petition, the Acting Solicitor General conceded that Hohn's claim that he is incarcerated for conduct that does not constitute a crime "may fairly be characterized as 'constitutional' and * * * the court [of appeals] erred in concluding otherwise." (Brief for United States, dated August 18, 1997, at 7). In confessing error on this critical point, the government suggested a remand to the court of appeals to allow it to reconsider whether petitioner has, in fact, made the requisite "substantial showing" within the meaning of §2253(c)(2) concerning his concededly constitutional claim to entitle him to full plenary merits review on appeal.

This Court instead has granted certiorari limited to the question of whether it has jurisdiction to act on the Acting Solicitor General's remand suggestion, in light of the court of appeals' prior denial of a certificate of appealability.[3]

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3 Another issue "fairly included" in the Court's jurisdictional question (Sup. Ct. Rule 14(a)) is whether its recent decision in Lindh v. Murphy, 117 S.Ct. 2059, 2063 (1997), decided after Hohn's certiorari petition was filed, conclusively establishes that AEDPA's appellate-certification procedure may not be applied retroactively in a case such as this, which was commenced in the district court prior to the effective date of the new habeas statute (April 24, 1996). As discussed at Point IV, infra, nonretroactivity of the appellate certification requirement for federal prisoners by itself mandates that Hohn's case be remanded to the court of appeals for plenary merits review on appeal.

SUMMARY OF ARGUMENT

1. This Court has statutory jurisdiction (28 U.S.C. §1254(1)) by which to entertain a federal petitioner's post-conviction certiorari petition absent a certificate of appealability from the court of appeals (28 U.S.C. §2253(c)). This Court clearly has the power to review courts of appeals' jurisdictional determinations. For those jurisdictional purposes, cases are deemed sufficiently "in" the court of appeals, under §1254, even where the court of appeals has determined that it lacked appellate jurisdiction. Moreover, where the court of appeals has combined merits review alongside its jurisdictional gatekeeper function, there can be no serious question that the case was effectively "in" the court of appeals sufficiently for this Court to exercise statutory certiorari jurisdiction.

2. This Court routinely invokes its common law certiorari authority under the All Writs Act (28 U.S.C. §1651) where the Court lacks statutory jurisdiction because the court of appeals declined to issue the necessary leave to appeal. This practice dates back to House v. Mayo, 324 U.S. 42 (1945) where the Court determined it had the power under common law certiorari not only to review the refusal to allow the appeal, but also to review the question on the merits raised by the appeal. Nothing contained in AEDPA's recent revision of the habeas statutes in any respect interferes with this Court's common law certiorari authority in this case.

3. The newly-enacted appellate certification requirement (§2253(c)(1)) limits the authorities empowered to issue a certificate to "a circuit justice or judge". Accordingly, plenary

appellate review should be afforded whenever either an individual circuit justice (of this Court) or a circuit judge (of the court of appeals) certifies that the habeas petitioner has made "a substantial showing of the denial of a constitutional right". §2253(c)(2). In this case, a dissenting circuit judge in the court of appeals has implicitly made this certification. A member of this Court, nonetheless, is also empowered to issue similar certification, which would have the effect of remanding this case to the court of appeals for plenary merits review.

4. AEDPA's appellate certification requirement does not apply retroactively to federal petitioners whose §2255 motions were pending in the district court prior to the date of the statute's enactment -- April 24, 1996. Lindh v. Murphy, 117 S.Ct. 2059 (1997). Since §2255 petitioners were entitled to appeal as of right under the predecessor statute to §2253, this case must be remanded to the court of appeals for plenary merits review.

ARGUMENT

I. THIS COURT HAS STATUTORY JURISDICTION BY WHICH TO ENTERTAIN A FEDERAL PRISONER'S CERTIORARI PETITION ABSENT A CERTIFICATE OF APPEALABILITY FROM THE COURT OF APPEALS, WHERE THE LOWER COURT HAS NEVERTHELESS ADDRESSED THE MERITS OF HIS §2255 CLAIMS

The threshold question raised in this case is whether, in light of the court of appeals' denial of a certificate of appealability, this case was adequately "in" the court of appeals to properly invoke this Court's certiorari jurisdiction. 28 U.S.C. §1254(1).

While it is clear, as discussed in Points II and III, infra, that this Court has several alternative bases upon which to exercise jurisdiction in this matter -- under the All Writs Act (28 U.S.C. §1651) as well as the habeas statutes themselves (28 U.S.C. §§2241(a) & 2253(c)(1)) -- this Court also possesses its customary statutory jurisdiction under §1254. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 741-43 & n.23 (1982); United States v. Nixon, 418 U.S. 683, 690 (1974). Moreover, in light of the court of appeals in this case having, in effect, conducted plenary merits review along with its decision to deny the certificate -- a split decision rendered by a divided court -- this case was sufficiently "in" the court of appeals notwithstanding its denial of a certificate to entitle this Court to exercise its statutory jurisdiction. Barefoot v. Estelle, 463 U.S. 880, 889-92, 894 (1983).

As one set of commentators has candidly observed, "[p]eculiar difficulties have been encountered in establishing review of cases that arguably are not 'in' the court of appeals because of failure to secure a required permission for appeal." 17 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure §4036 at 14 (2d ed. 1988); see generally id. at 10-19.

Nevertheless, this Court has determined that even where the court of appeals had erroneously dismissed an appeal for lack of jurisdiction, the case was deemed sufficiently "in" the court of appeals for purposes of §1254 that it was properly within its certiorari jurisdiction. Nixon v. Fitzgerald, 457 U.S. at 743 n.23 ("There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction -- a power we have exercised routinely"). Indeed, Fitzgerald confirmed that this Court may review a ruling of the court of appeals that it lacked jurisdiction even if the result is to affirm the ruling as correct. Id. at 741-43.

In the case at bar, where the court of appeals -- obviously taking its cue from Barefoot -- has combined merits review alongside its quasi-jurisdictional gatekeeper function, there can be no serious question that for all practical purposes, this case was effectively "in" the court of appeals sufficient to pass muster under §1254(1). See 17 Wright et al., §4036 at 16 ("[S]tatutory certiorari should be available. Leave to appeal can be denied only after the court of appeals has so far considered the merits of the questions presented as to have brought the case within any reasonable purpose of the requirement that it be in that court. Indeed, statutory certiorari should be available in any other case in which it is claimed that a court of appeals has improperly denied leave to appeal")(and authorities collected therein).

It is axiomatic, then, that where the court of appeals has combined merits review alongside its quasi-jurisdictional gatekeeping function, it would be the ultimate exaltation of form over substance to assert seriously that this case was not adequately "in" the court of appeals sufficiently to qualify for statutory certiorari. Particularly where the lower court itself divided over the very merits of Hohn's Bailey claim, it may hardly be gainsaid that that court had, in effect, already granted him precisely the sort of plenary merits review to which a certificate of appealability would have otherwise entitled him. That being the case, Hohn should be entitled to invoke directly this Court's statutory certiorari jurisdiction.

II. THIS COURT MAY EXERCISE JURISDICTION BY INVOKING COMMON LAW CERTIORARI UNDER THE ALL WRITS ACT WHERE STATUTORY CERTIORARI IS UNAVAILABLE

As Justice Stevens noted in Davis, 454 U.S. at 912-14,

this Court may (and routinely does) invoke its common law certiorari authority under the All Writs Act (28 U.S.C. §1651) in circumstances virtually identical to those in the case at bar -- where the Court lacks statutory certiorari jurisdiction because the court of appeals declined to issue the necessary leave to appeal. See Robbins, 44 Ohio St. L.J. at 312 n.27.

In House v. Mayo, 324 U.S. 42 (1945), this Court determined that it lacked certiorari jurisdiction under the predecessor statute to §1254 where the lower court had denied a certificate of probable cause to appeal. Nevertheless, relying on prior Court decisions defining the scope of the common law writ of certiorari under the All Writs Act, the Court found the power not only to review the refusal to allow the appeal, but also to review the question on the merits raised by the appeal. 324 U.S. at 44-45.[4]

Accordingly, since House, the arguable unavailability of statutory certiorari has routinely been cured by use of common law certiorari, which is now the customary vehicle invoked where a petitioner has been unable to secure permission to appeal or leave to appeal in forma pauperis from the court of appeals. See 17 Wright, §4036 at 14-16 (and cases collected therein); see also id., §4005 at 111-12. Indeed, the practice has become so commonplace that the Court no longer distinguishes simple denials of statutory certiorari from refusals to invoke common law certiorari. Davis, 454 U.S. at 914; cf. Head v. California, 374 U.S. 509 (1963)(application for common law certiorari granted as petition for statutory certiorari); Carafas v. LaVallee, 391 U.S. 234 (1968)(accord); as well as the cases cited earlier in this brief, ante, at 3 n.2.

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4 Professor Oaks provides the most thorough discussion of the evolution of common law certiorari culminating in House and Holiday v. Johnston, 313 U.S. 342 (1941). See Oaks, 1962 Sup. Ct. Rev. at 182-88.

Nor have Congress' recent habeas revisions under AEDPA in any respect abrogated this Court's statutory (or common law) certiorari jurisdiction. In Felker v. Turpin, 116 S.Ct. 2333 (1996), this Court determined that while newly-amended §2244(b)(3)(E) explicitly precluded this Court from reviewing by way of certiorari a court of appeals' refusal to entertain a successive writ application, it did not otherwise interfere with this Court's power to entertain a successive writ application as an original matter in the Court. Id. at 2338-39.

Certainly, if amended §2244(b) -- which explicitly abrogated statutory certiorari in successive writ cases -- was not deemed a repeal by implication of this Court's common law habeas authority, then a fortiori §2253(c)(1) -- which contains no language respecting the Court's certiorari authority and, indeed, explicitly authorizes "a circuit justice" to issue a certificate of appealability -- may hardly be construed to abolish or in any respect interfere with this Court's common law (or statutory) certiorari jurisdiction. As long ago as 1821, in Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), this Court required a clear statement before concluding that Congress intended to affect this Court's appellate jurisdiction. Id. at 379-80.[5]

Accordingly, this Court remains free to exercise its common law certiorari authority under the All Writs Act and remand this case to the court of appeals, as suggested by the Acting Solicitor General.

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5 Indeed, except for §2244(b)'s limitation on "writ[s] of certiorari" in the context of successive habeas petitions, the AEDPA makes no other mention of this Court's jurisdiction.

III. A CERTIFICATE OF APPEALABILITY MAY BE ISSUED BY AN INDIVIDUAL CIRCUIT JUSTICE OR CIRCUIT JUDGE

The newly-enacted appellate certification requirement (§2253(c)(1)) limits the authorities empowered to issue a certificate to "a circuit justice or judge", thereby leaving an open question whether the certificate is to be issued by an individual justice or circuit judge as opposed to the Court itself or a three-judge panel. The distinction is not a trivial one -- compare §2253(c)(1)("a circuit justice or judge") with §2244(b)(3)(B)(authorization for permission to file second or successive petition must be granted by "a three-judge panel of the court of appeals").

Congress' choice of different language for different provisions of the AEDPA clearly manifests an intention to create different procedures for separate provisions of the Act. See Lindh, 117 S.Ct. at 2063 (chapter 153 interpreted prospectively in the absence of chapter 154's specific retroactivity language). While a court of appeals may choose to assign such motions to three-judge panels, see In re Burwell, 350 U.S. at 522, it cannot thereby repeal petitioner's statutory right to appeal with the permission of a single judge. Compare Ojeda Rios v. Wigen, 863 F.2d 196, 199-200 & n.3 (2d Cir. 1988)(Newman, J., in chambers)(discussing relevance and importance of distinctions between "judges" and "courts" in context of habeas corpus).[6]

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6 As noted by Justice Stevens in Davis, 454 U.S. at 913-14, under now-superseded §2253, a circuit justice, or the Court itself, was empowered to issue a certificate of probable cause, citing Rosoto v. Warden, 83 S.Ct. 1788 (1963)(Harlan, J., in chambers). Of course, under the old statute, federal §2255 petitioners had no need of appellate certification; their cases were appealable as of right.

Accordingly, Hohn is entitled to plenary appellate review where either an individual circuit justice (of this Court) or a circuit judge (of the court of appeals) certifies that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

In this case, Judge McMillian, albeit outvoted by his two colleagues, nonetheless made precisely the certification called for by the new statute (Pet. App. 2a-7a). Indeed, the Acting Solicitor General made virtually the same concession when he represented to this Court that Hohn's claim was substantial and warranted remand to the court of appeals. Moreover, this Court's grant of certiorari in Bousley to resolve the underlying retroactivity question of Bailey is not without relevance here. Indeed, among the principal identifiable reasons for granting appellate certification is that this Court has granted certiorari to review a "similar" question in another case. See 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §35.4b at 1079-80 n.17 (2d ed. 1994)(and cases collected therein).

Under the totality of these unique circumstances -- and even in the absence of Judge McMillian's dissent on the merits -- any individual justice of this Court clearly has the authority to grant Hohn a certificate of appealability and remand his case to the court of appeals where it would then receive full plenary merits review.[7]

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7 Analogy may, indeed, be drawn with this Court's Rule of Four, whereby a minority of the Justices of this Court may nonetheless grant plenary review to a case, even where outvoted by a majority of their colleagues. See, e.g., John Paul Stevens, The Life Span Of A Judge-Made Rule, 58 NYU L. Rev. 1, 10, 16-20 (1983). Of course, the Rule of Four is a judge-made rule of practice, whereas the individual circuit justice/circuit judge rule is explicitly mandated by Congress.

IV. AEDPA'S APPELLATE CERTIFICATION REQUIREMENT DOES NOT APPLY RETROACTIVELY TO CASES COMMENCED PRIOR TO ITS EFFECTIVE DATE

In Lindh v. Murphy, this Court held that AEDPA's amendments to Chapter 153 of Title 28, United States Code -- including §2253(c), the provision requiring certificates of appealability -- do not apply to cases that were already pending on the date AEDPA was signed into law -- April 24, 1996. 117 S.Ct. at 2063 ("The statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment * * * We read this provision ... as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act"). The government concedes here that Hohn's §2255 petition was already pending in the district court prior to AEDPA's enactment.

AEDPA's nonretroactivity is significant in the context of this case. Under prior law, federal §2255 petitioners were not required to obtain permission to appeal to the court of appeals; their habeas appeals, unlike those of state prisoners, were heard as a matter of right. See Robbins, 44 Ohio St. L.J. at 313-15.

Accordingly, under Lindh, federal petitioners such as Hohn are entitled to automatic plenary merits review in the court of appeals where their §2255 petitions were pending in the district court prior to April 24, 1996. Independent of all other grounds for relief in this case, the court of appeals' retroactive misapplication of the appellate certification procedure to Hohn has created the anomalous situation in which it may have improperly deprived this Court of its own statutory jurisdiction

to review a jurisdictional error committed by the lower court insofar as it declined to exercise mandatory jurisdiction over an appeal it was legally required to accord plenary merits review. See Kerr v. U.S. District Court, 426 U.S. 394 (1976)(common law writs used to correct lower courts' jurisdictional errors); Will v. United States, 389 U.S. 90, 95 (1967)(common law writ appropriate "to compel [inferior court] to exercise its authority when it is its duty to do so"). See also Robert L. Stern et al., Supreme Court Practice §11.2(2) at 495 (7th ed. 1993)("Correcting jurisdictional error"); id. §11.2(3) at 500-01 ("Protecting appellate jurisdiction of Supreme Court").

Indeed, the courts of appeals have held with virtual unanimity that, in the wake of Lindh, appellate certification is not required for federal petitioners whose §2255 petitions were pending in the district court prior to April 24, 1996. See, e.g., United States v. Perez, 1997 WL 691075 at *5-6 (2d Cir. 1997); United States v. Skandier, 125 F.3d 178, 180-82 (3d Cir. 1997); Williams v. Cain, 117 F.3d 863, 864-65 (5th Cir. 1997); Arredondo v. United States, 120 F.3d 639 (6th Cir. 1997); Koo v. McBride, 124 F.3d 869, 872 (7th Cir. 1997); United States v. Kunzman, 125 F.3d 1363, 1364 & n.2 (10th Cir. 1997); Hardwick v. Singletary, 122 F.3d 935 (11th Cir. 1997). [8]

The only court to rule otherwise is the Eighth Circuit in Tiedman v. Benson, 122 F.3d 518 (8th Cir. 1997). It did so applying a tortuous reading of Lindh, viewing this Court's use

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8 Indeed, in Perez, supra at *5, the Second Circuit interpreted the Lindh Court's reference to Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996)(en banc), which addressed the analogous question at issue here, as an indication of the Court's intention to address the retroactivity of all of new chapter 153's provisions enacted by the AEDPA. See also Williams v. Cain, 117 F.3d at 864-65. As the Eleventh Circuit subsequently noted, Lindh effectively overruled that portion of its Hunter decision suggesting that the AEDPA's provisions applied retroactively. Hardwick, 122 F.3d at 936.

of the word "generally" in the majority opinion's penultimate sentence (117 S.Ct. at 2068) as significantly qualifying its holding, implying that this Court did not mean to suggest that all of Chapter 153's provisions applied prospectively. The Third and Tenth Circuits have considered and rejected this strained interpretation out of hand. Skandier, 125 F.3d at 182; Kunzman, 125 F.3d at 1364 n.2. As Judge Becker resolved the question in Skandier:

> The essential message of Lindh, we believe, is that we need not resort to a Landgraf analysis with its default rules of retroactive/prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended.
>
> * * *
>
> Thus, since §2253(c) is part of chapter 153, we hold that that section should not apply to a §2255 motion that was filed before AEDPA's effective date. Because we dispose of this case on the grounds of Congressional intent, as the Supreme Court itself has found it, we need not address the matters that would be predicate to determining applicability of the default rules.

Under the totality of circumstances, then, Lindh dictates the result here. No certificate of appealability was required for Hohn to receive full-dress plenary merits review of his appeal. Just as this Court determined in Felker that it retained original habeas jurisdiction to review errors committed in the courts of appeals in the consideration of successor habeas petitions under AEDPA, so, too, this Court retains the power to review courts

of appeals' refusals to exercise their own jurisdiction to entertain appeals they are otherwise required to hear on the merits.

Accordingly, this Court should remand this case to the court of appeals with instructions to exercise its plenary merits review function. Barefoot v. Estelle, 463 U.S. at 894.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further consideration, inter alia, of Bailey v. United States, 116 S. Ct. 501 (1995).

Respectfully submitted,

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